Sabah Forest Industries Sdn Bhd v Industrial Court Malaysia & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01–227 OF 2011
RAMLY ALI, AZHAR MA'AH AND ABDUL AZIZ ABDUL RAHIM JJCA
15 MAY 2012

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Civil Procedure — Judicial review — High Court — Application for judicial review at High Court on award of Industrial Court — Dismissal without just cause or excuse — Mode of proceedings — Whether application ought to have been brought under s 33A Industrial Relations Act 1967 — Review jurisdiction of High Court over decision of inferior tribunal — Whether application for judicial review of Industrial Court award in question allowed — Whether one could challenge Industrial Court award by way of judicial review — Whether s 33A proscribed judicial review remedy under O 53 of the Rules of the High Court 1980

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The second respondent was dismissed from employment by the appellant company and the former took the matter to the Industrial Court. At the Industrial Court, it was held that the appellant company had failed, on the balance of probability, to establish both the allegations against the second respondent and concluded that the second respondent was dismissed without just cause or excuse. The appellant company was ordered to pay back wages to the second respondent from the date of his dismissal till the last date of the hearing but limited to 24 months, together with compensation of one month's salary for each completed year of service. Aggrieved by the decision of the Industrial Court, the appellant company filed an application under O 53 of the Rules of the High Court 1980 ('RHC') for a judicial review at the High Court. The appellant filed an ex parte application for leave to initiate judicial review proceedings and leave was granted for the appellant to apply for an order of certiorari and to stay the Industrial Court Award and/or actions and proceedings by the second respondent pending disposal of the judicial review. Notice of hearing of the application for judicial review was filed at the High Court, and notice of preliminary objection of the second respondent was served on the appellant's solicitors. The learned judicial commissioner ('JC') allowed the preliminary objection and dismissed the judicial review application with costs to the second respondent to be taxed unless otherwise agreed. Dissatisfied with the said order of the learned JC, the appellant appealed and hence, the present appeal. The second respondent raised a preliminary objection on the mode of proceeding adopted by the appellant and contended that the application ought to have been brought under s 33A of the Industrial Relations Act 1967 ('IRA'). It was further contended that s 33B of the IRA

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provided that the award made by the Industrial Court was final and conclusive and thus the application for judicial review was misconceived. On the other hand the appellant, contended that the High Court have always had review jurisdiction over the decision of inferior tribunal, including the Industrial Court, even in the face of the provisions of s 33A of the IRA. Therefore the appellant would not be prohibited from applying for judicial review of the Industrial Court award in question. The issue that arose before the present court was whether the appellant could challenge the Industrial Court award by way of a judicial review; or in the alternative whether s 33A of the IRA proscribed a judicial review remedy under O 53 of the RHC.

Held, allowing the appeal with costs:

(1) The appellant had initiated judicial review under O 53 of the RHC. All the relevant requirements under the said O 53 of the RHC have been complied with. Leave had also been granted prior to filing for the judicial review application. Authorities showed that the applicants were challenging the order or award of the Industrial Court earlier made against them. The order or award of the Industrial Court was amendable to judicial review. The mode of proceedings under O 53 of the RHC as adopted by the appellant in the present case was correct under the relevant rules. Therefore there was no reason for the learned JC to uphold the respondent's preliminary objection and to dismiss the appellant's action with costs (see para 33).

(2) The learned JC had raised his concern that the Industrial Court had been made a party, as the first respondent, to an action and according to him, this was against the spirit of s 24(2) of the IRA. The court could not see the reason why the learned JC was so unduly concerned on this issue. When the Industrial Court was made a party in an action for judicial review of this nature, it was the award of the Industrial Court that was being challenged. It had nothing to do with any member of the court (see para 34).

(3) Any party who is dissatisfied with the decision of the Industrial Court, either on procedural or substantive grounds (on merits) is entitled in law to apply for judicial review to the High Court pursuant to O 53 of the RHC without having to invoke the mechanism under s 33A of the IRA. The provisions of the IRA, particularly ss 33A(7) and 33B did not proscribe a judicial review remedy under O 53 of the RHC. This is the current position of the law on the matter. It was decided, adopted, followed and reaffirmed by the highest court of the country, the Federal Court, in a number of cases. It binds all courts below. The doctrine of binding precedent stare decisis is clear and well-settled (see para 36).

(4) The Industrial Court, in proceedings before it, had made a decision in favour of the respondent (employee) that the respondent was dismissed

by the appellant (employer) without just cause or excuse. The proceedings were completed and an award was handed down by the Industrial Court. What the appellant wanted was to challenge the decision and the award made by the Industrial Court; not to refer any question of law to the High Court under s 33A of the IRA as suggested by the learned JC. Challenging the whole decision and award by way of judicial review may involve issues of law as well as of facts, evidence and merits. Mechanism under s 33A of the IRA is confined to reference on question of law only. It does not serve the purpose of the appellant in the present case. The appellant had clearly adopted the correct mode and procedure by applying for a judicial review pursuant to O 53 of the RHC (see para 38).

[Bahasa Malaysia summary

Responden kedua telah dibuang kerja oleh syarikat perayu dan responden kedua membawa perkara tersebut ke Mahkamah Perusahaan. Di Mahkamah Perusahaan, diputuskan bahawa syarikat perayu telah gagal, atas imbangan kebarangkalian, untuk membuktikan kedua-dua tuduhan terhadap responden kedua dan membuat kesimpulan bahawa responden kedua telah dibuang kerja tanpa sebab atau alasan yang adil. Syarikat perayu telah diperintahkan untuk membayar gaji tertunggak kepada responden kedua bermula dari tarikh pemecatannya hingga tarikh terakhir perbicaraan tetapi terhad kepada 24 bulan, bersama-sama dengan pampasan sebulan gaji bagi setiap tahun genap perkhidmatannya. Terkilan dengan keputusan Mahkamah Perusahaan, syarikat perayu memfailkan permohonan di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi suatu semakan kehakiman di Mahkamah Tinggi. Perayu memfailkan permohonan ex parte bagi kebenaran untuk memulakan prosiding semakan kehakiman dan kebenaran diberikan kepada perayu untuk memohon suatu perintah certiorari dan penangguhan award Mahkamah Perusahaan dan/atau tindakan-tindakan dan prosiding oleh responden kedua sementara menunggu pelupusan semakan kehakiman. Notis perbicaraan permohonan untuk semakan kehakiman telah difailkan di Mahkamah Tinggi, dan notis bantahan awal responden kedua telah disampaikan kepada peguam cara perayu. Pesuruhjaya kehakiman ('PK') membenarkan bantahan awal dan menolak permohonan semakan kehakiman dengan kos kepada responden kedua untuk ditaksirkan melainkan dipersetujui sebaliknya. Tidak berpuashati dengan perintah tersebut, perayu merayu dan dengan itu, rayuan ini. Responden kedua membangkitkan bantahan awal mengenai cara perayu memulakan prosiding dan menghujahkan bahawa permohonan tersebut sepatutnya dibawa di bawah s 33A Akta Perhubungan Perusahaan 1967 ('APP'). Dihujahkan lagi bahawa s 33B APP memperuntukkan bahawa award yang dibuat oleh Mahkamah Perusahaan adalah muktamad dan konklusif dan dengan itu permohonan untuk semakan kehakiman telah disalah anggap. Sebaliknya, perayu menghujahkan bahawa Mahkamah Tinggi mempunyai bidang kuasa semakan sedia ada ke atas

keputusan tribunal rendah, termasuk Mahkamah Perusahaan, walaupun dengan wujudnya peruntukan s 33A APP. Oleh itu, perayu tidak dilarang daripada memohon semakan kehakiman award Mahkamah Perusahaan yang menjadi pertikaian. Isu yang timbul di hadapan mahkamah ini adalah sama ada perayu boleh mencabar award Mahkamah Perusahaan dengan cara semakan kehakiman; atau secara alternatif sama ada s 33A APP melarang semakan kehakiman di bawah A 53 KMT.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu telah memulakan semakan kehakiman di bawah A 53 KMT. Kesemua keperluan yang relevan di bawah A 53 KMT telah dipatuhi. Kebenaran juga telah diberikan sebelum pemfailan permohonan semakan kehakiman. Nas-nas menunjukkan bahawa pemohon telah mencabar perintah atau award Mahkamah Perusahaan awal yang dibuat terhadap mereka. Perintah atau award Mahkamah Perusahaan tertakluk kepada pindaan semakan kehakiman. Cara prosiding di bawah A 53 KMT seperti yang digunapakai oleh perayu dalam kes ini adalah betul di bawah kaedah-kaedah yang berkaitan. Oleh itu tidak ada sebab bagi PK untuk membenarkan bantahan awal responden dan menolak tindakan perayu dengan kos (lihat perenggan 33).

(2) PK telah menyuarakan kebimbangan beliau bahawa Mahkamah Perusahaan telah dijadikan pihak, iaitu sebagai responden pertama, kepada tindakan dan menurut beliau, ini bertentangan dengan tujuan s 24(2) APP. Mahkamah tidak dapat melihat sebab mengapa PK begitu bimbang mengenai isu ini. Apabila Mahkamah Perusahaan telah dijadikan suatu pihak dalam suatu tindakan untuk semakan kehakiman sebegini, yang dicabar adalah award Mahkamah perusahaan. Ia tiada kaitan dengan mana-mana anggota mahkamah (lihat perenggan 34).

(3) Mana-mana pihak yang tidak berpuas hati dengan keputusan Mahkamah Perusahaan, sama ada atas alasan prosedur atau substantif (berdasarkan merit) berhak, dari segi undang-undang untuk memohon semakan kehakiman ke Mahkamah Tinggi menurut A 53 KMT tanpa perlu membangkitkan mekanisme di bawah s 33A API. Peruntukan APP, terutamanya ss 33A(7) dan 33B tidak melarang remedi semakan kehakiman di bawah A 53 KMT. Ini adalah kedudukan semasa undang-undang bagi perkara tersebut. Ia telah diputuskan, diguna pakai, diikuti dan disahkan oleh mahkamah tertinggi negara, iaitu Mahkamah Persekutuan, dalam beberapa kes. Ia mengikat semua mahkamah bawahan. Doktrin duluan mengikat stare decisis adalah jelas dan mantap (lihat perenggan 36).

(4) Mahkamah Perusahaan, dalam prosiding di hadapannya, telah membuat keputusan memihak kepada responden (pekerja) bahawa responden telah dibuang kerja oleh perayu (majikan) tanpa sebab atau alasan yang

adil. Prosiding tersebut telah lengkap dan award telah diberikan oleh Mahkamah Perusahaan. Apa yang dipohon oleh perayu adalah untuk mencabar keputusan dan award yang dibuat oleh Mahkamah Perusahaan; bukan untuk merujuk apa-apa persoalan undang-undang kepada Mahkamah Tinggi di bawah s 33A APP seperti yang dicadangkan oleh PK. Mencabar keseluruhan keputusan dan award dengan cara semakan kehakiman boleh melibatkan isu undang-undang serta fakta, bukti dan merit. Mekanisme di bawah 33A s APP terhad kepada rujukan mengenai persoalan undang-undang sahaja. Ia bukan bagi tujuan perayu dalam kes ini. Perayu jelas mengguna pakai cara dan prosedur yang betul dengan memohon untuk semakan kehakiman menurut A 53 KMT (lihat perenggan 38).]

Notes

For cases on High Court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5119–5123.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Chief Constable of North Wales v Evans [1982] 1 WLR 1155, HL (refd)

Council of Civil Service Union & Ors v Minister for Civil Service [1985] AC 374, HL (refd)

Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 1 MLJ 363; [1984] 1 CLJ (Rep) 155, FC (refd)

Kesatuan Pekerja2 Kenderaan Jaya v Industrial Court & Ors [1969] 2 MLJ 27 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Sabah Banking Employees' Union v Sabah Commercial Banks' Association [1989] 2 MLJ 284, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25 Schedule, para 1

Industrial Relations Act 1967 ss 20(3), 24(2), 30(1), 33A, 33A(1), (1)(a), (b), (c), (d), (2), (3), (4), (5), (6), (7), 33B

Rules of the High Court 1980 O 53

Appeal from: Judicial Review No K 25–01 of 2010–1 (High Court, Kota Kinabalu)

Sukumaran Vanugopal (S Vanugopal & Partners) for the appellant.
Yunof Maringking (Maringking & Co) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

THE APPEAL

[1] This is an appeal against the decision of the learned judicial commissioner dismissing the appellant's judicial review application on a preliminary objection of the second respondent on the ground that the appellant should have, in the light of the specific provisions of s 33A of the Industrial Relations Act 1967 ('the IRA'), challenged the Industrial Court award (Award No 1441/2009) by way of reference to the High Court on a question of law under the said s 33A and not by way of a judicial review application under O 53 of the Rules of the High Court 1980 ('the RHC').

FACTUAL BACKGROUND

[2] The second respondent commenced employment with the appellant company as an administration superintendent on 1 August 1984. He was confirmed in that post on 20 December 1984. He was then promoted to the post of assistant administration manager on 1 February 1996 and was assigned with the responsibility to manage all housing matters of the company. He held that post until he was dismissed on 2 March 2006.

[3] On 7 February 2006, the second respondent was issued with a show cause letter and was suspended from work for 14 days with half pay with effect from 8 February 2006 with regard to two allegations of misconduct. He replied to the show cause letter on 9 February 2006. He was later served with a letter dated 13 February 2006 requiring him to appear before a domestic inquiry proceeding on 16 February 2006 purportedly on two charges. After expiry of his 14 days suspension, he was later suspended from work on full pay until the panel of the domestic inquiry had made a decision.

[4] On 2 March 2006, the appellant company, on recommendation of the panel of the domestic inquiry, dismissed the second respondent from his employment.

[5] The dispute, as to his dismissal, was referred to the Industrial Court by the Minister under s 20(3) of the IRA.

AT THE INDUSTRIAL COURT

[6] The Industrial Court found that the appellant company has failed on the

balance of probability to establish both the allegations against the second respondent and concluded that the second respondent was dismissed without just cause or excuse. The Industrial Court ordered the appellant company to pay backwages to the second respondent from the date of his dismissal (on 2 March 2006) till the last date of the hearing (on 9 October 2008) but limited to 24 months, together with compensation of one month's salary for each completed year of service.

[7] Aggrieved by the decision of the Industrial Court, the appellant company filed an application for judicial review at the High Court pursuant to O 53 of the RHC.

AT THE HIGH COURT

[8] On 15 January 2010, the appellant filed an ex parte application for leave to initiate judicial review proceedings. On 11 February 2010, leave was granted for the appellant to apply for an order of certiorari and to stay the Industrial Court award and/or actions and proceedings by the second respondent pending the disposal of the judicial review. On 25 February 2010 notice of hearing of the application for judicial review was filed at the High Court, and on 25 March 2010 notice of preliminary objection of the second respondent was served on the appellant's solicitors. On 30 March 2010, the learned judicial commissioner allowed the preliminary objection and dismissed the judicial review application with costs to the second respondent to be taxed unless agreed.

[9] On 21 April 2010, the appellant being dissatisfied with the said order of the learned judicial commissioner appealed to the Court of Appeal against the said decision. Hence the present appeal before us.

THE SECOND RESPONDENT'S CONTENTIONS

[10] At the commencement of the inter parte hearing for the judicial review proceeding, the learned counsel for the second respondent raised a preliminary objection on the mode of proceeding adopted by the appellant. The second respondent contended that the application to challenge the said award ought to have been by way of reference to the High Court on question of law under s 33A of the IRA, and not by way of judicial review under O 53 of the RHC. The second respondent further contended that by virtue of the provisions of s 33B of the IRA, the award made by the Industrial Court is final and conclusive and thus the application for judicial review is misconceived.

THE APPELLANT'S CONTENTIONS

[11] The appellant on the other hand contended that the High Court always

had the review jurisdiction over the decision of inferior tribunal, including the Industrial Court, even in the face of the provisions of s 33A of the IRA. Therefore the appellant would not be prohibited from applying for judicial review of the Industrial Court award in question.

FINDINGS OF THE HIGH COURT

[12] The learned judicial commission upheld the preliminary objection by the second respondent and dismissed the appellant's application for judicial review with costs. The learned judicial commissioner was of the view that the procedure under s 33A of the IRA is the procedure prescribed by law for challenging the award made by the Industrial Court pursuant to s 30(1) of the IRA, and there is no provision in the IRA that provides for an alternative mode of challenging the award. The learned judicial commissioner was also of the view that 'a party aggrieved by the Industrial Court award has the right to challenge the award by applying for reference on points of law. This right is provided by s 33A(1) of the IRA'.

[13] At pp 9–10 of his grounds of judgment the learned judicial commissioner held:

> The aggrieved party's right to choose which mode suits him best cannot depend on whether judicial review is available to him but whether he has the right of choice in the first place. It must be noted that the conditions under s 33A(1)(a)–(d) of the IRA are conditions that an aggrieved party must fulfill before any question of law qualified for reference. By applying directly to the High Court for judicial review what the applicant in the present case is doing is to dodge those conditions. In my judgment this is not a choice open to the applicant. If the law that regulates the procedure for challenging the Industrial Court award prohibits direct challenge to the High Court it is scandalous to suggest that the aggrieved party can circumvent that prohibition by adopting a mode that allows him to do so. That is tantamount to allowing the aggrieved party to apply through the back door.

[14] The learned judicial commissioner concluded:

> In my judgment since the mode for challenging the award is prescribed by law, ie by s 33A of the IRA, the challenge must be made by this mode and no other mode. The procedure under O 53 of the RHC is only permissible if the IRA is silent on the procedure for challenging the award.

THE ISSUE

[15] The issue at hand is whether judicial review application to the High Court is available in law to a party who is dissatisfied with the decision or award of the Industrial Court, in the light of the specific provisions in s 33A of the

IRA. In other words, whether the appellant (in the present case) could in the light of s 33A of the IRA challenge the Industrial Court Aaward by way of a judicial review; or in the alternative whether s 33A of the IRA proscribes a judicial review remedy under O 53 of the RHC. A

[16] The relevant sections for consideration in the present appeal are ss 33A–33B of the IRA which reads as follows: B

33A Reference to the High Court on a question of law

(1) where the court has made an award under section 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law — C

(a) which arose in the course of the proceedings;

(b) the determination of which by the court has affected the award;

(c) which, in the opinion of the court, is of sufficient importance to merit such reference; and D

(d) the determination of which by the court raises, in the opinion of the court, sufficient doubt to merit such reference.

(2) where an application under subsection (1) has been granted by the court, compliance with the award in respect of which the application has been granted shall be stayed pending the disposal of the reference by the High Court, unless the court otherwise directs in respect of the whole or a part of the award. E

(3) an application under this section shall be made within thirty days of the date on which the award was made. F

(4) where a question has been referred to the High Court under this section, the court shall forward the record of proceedings to the Registrar of the High Court who shall thereupon appoint and notify to the parties to the proceedings the time and place for its hearing. G

(5) the High Court shall hear and determine the question referred to it under this section as if the reference were an appeal to the High Court against the award of the court, and may, consequently, confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary.

(6) a decision of the High Court under subsection (5) shall have the same force and effect as an award of the High Court under section 32, and may be enforced as if it were an award of the court. H

(7) a decision of the High Court under subsection (5) shall be final and conclusive, and no such decision shall be challenged, appealed against, reviewed, quashed or called in question in any other court or before any other authority, judicial or otherwise, whatsoever. I

[17] Section 33B of the IRA is also related. It provides:

> Subject to this Act and the provisions of section 33A, an award, decision or order of the court made under this Act (including the decision of the court whether to grant or not to grant an application under section 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

(Both ss 33A–33B of the IRA came into force on 30 May 1980).

[18] Reading s 33A closely it appears that it deals with 'Reference to the High Court on a question of law'. It only covers matters or issues on 'question of law' which arose in the course of the proceedings before the Industrial Court. Logically, it does not cover matters or issues involving question of fact or evidence. The reference to the High Court can only be made by the Industrial Court, but not directly by the party to the proceedings. Any party to the proceedings can only make an application for the matters or issues in questions to be referred to the High Court. The final say — whether to refer or not to refer the question to the High Court still lies with the Industrial Court's discretion. The 'key' to the reference under the section is with the Industrial Court, but not with the aggrieved party.

[19] Even though s 33A(5) provides that the High Court shall hear and determine the question referred to it under the section as if the reference were an appeal to the High Court against the award of the Industrial Court, the process of getting into the mechanism is different from the process of initiating an appeal by the aggrieved party. In an ordinary civil appeal, the aggrieved party is entitled to file a notice of appeal (by him) within the stipulated time to the court which delivers the decision or the award; and consequently, the appeal process starts. It covers a wide range of issues, of law and fact. The 'key' to invoke the appeal process is clearly at the hand of the aggrieved party.

[20] On the other hand, the reference mechanism under s 33A of the IRA effectively lies with the discretion of the Industrial Court. The Industrial has the discretion whether to refer or not to refer the questions to the High Court. The Industrial Court has the discretion to determine (in its opinion) whether the question is of sufficient importance to merit such reference. The Industrial Court also has the discretion to determine (in its opinion) whether the determination of the question raises sufficient doubt to merit such reference (see: sub-s (1)(c)–(d) to s 33A). In short, the 'key' to invoke the reference mechanism under the section is clearly in the hand of the Industrial Court. The section does not guarantee that the aggrieved party's wish to refer the question to the High Court is achievable.

[21] Judicial review on the other hand is a creature of the common law and is available in the exercise of the court's inherent power. It extent may be

determined not merely by judicial development but also by legislative intervention (see *Chief Constable of North Wales v Evans* [1982] 1 WLR1155).

[22] Judicial review mechanism reached our shores in late 1960's (see *Kesatuan Pekerja2 Kenderaan Jaya v Industrial Court & Ors* [1969] 2 MLJ 27). From then on, application for judicial review kept coming to the High Court to quash the awards of the Industrial Court.

[23] In Malaysia, judicial review jurisdiction is derived from the prerogative jurisdiction inherited from English decisions as well as from Malaysian statutes (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 195). The relevant statute is the Courts of Judicature Act 1964, which by s 25, read with para 1 of the Schedule to the Act, provides that the powers of the High Court include:

> Power to issue to any person or authority, directions, orders, writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by part II of the Constitution, or any of them, or for any purpose.

[24] The Federal Court in *Rama Chandran* case has altered the scope of judicial review radically in that a court exercising judicial review has the power to review the decision of the Industrial Court on its merits, quash it by certiorari, substitute the decision of the Industrial Court with a different decision and also mould the relief, (not only to order reinstatement or payment of compensation, but in the latter case, the court can also compute the quantum of compensation).

[25] Now, a decision susceptible to judicial review is not only open to challenge on the ground of procedural impropriety, but also on the grounds of illegality, irrationality and proportionality (see *Rama Chandran* case, and *Council of Civil Service Union & Ors v Minister for Civil Service* [1985] AC 374). Illegality becomes a ground for judicial review when the Industrial Court or administrative authority acts outside the perimeters of its power. Irrationality becomes a ground for judicial review, when the Industrial Court decision is tainted by *Wednesbury* unreasonableness ie a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Procedural impropriety becomes a ground for judicial review not only when the Industrial Court or public decision-maker fails to observe the principles of natural justice but also involves failure to observe procedural rules that are expressly laid down in the statute which it derives its jurisdiction or power to decide. Proportionality is a ground for judicial review when the punishment is altogether excessive and out of proportion to the misconduct.

Procedural impropriety restricts judicial review to reviewing the decision making process only; but for the other three grounds ie illegality, irrationality and proportionality, the review can be for both process and substance.

[26] The current position of the law on judicial review affecting the Industrial Court decision in Malaysia had been clearly explained and clarified by Raus Sharif, FCJ (now PCA) in the recent Federal Court case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1, where His Lordship held:

> Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permit the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

[27] It was also held in that case that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived by taking into consideration irrelevant matters, or had failed to consider relevant matters, such findings are always amendable to judicial review by the High Court.

[28] Despite the provisions of the ouster clause in ss 33A(7)–33B of the IRA, the decision or award of the Industrial Court cannot escape the judicial interference by way of judicial review of the High Court. In relation to this, George Seah FJ, in the Federal Court case of *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363; [1984] 1 CLJ (Rep) 155 held:

> Such a clause as contained in s 33B(1) of the Act does not have the effect of ousting the inherent supervisory power of the High Court to quash the decision of the Industrial Court by certiorari proceedings if it had acted without or in excess or had done or failed to do something which rendered its decision a nullity.

[29] In 1989, the Federal Court had once again, in the case of *Sabah Banking Employees' Union v Sabah Commercial Banks' Association* [1989] 2 MLJ 284, clarified the issue of the ouster clauses in the IRA. In that case, Abdul Hamid LP held:

> Industrial Court awards are statutorily sheltered from appellate review by s 33B(1) of the Act which provides that 'an award, decision or order of the court … shall be final and conclusive, and shall not be challenged, appealed against, reviewed,

quashed, or called in question in any court.' Nonetheless, it has been consistently held that such privative or ouster clauses cannot proscribe certiorari against awards that exceed the inferior tribunal's jurisdiction. The Privy Council so interpreted this same ouster clause when it was then s 29(3) of the Act: *South East Asia Fire Bricks v Non-Metallic Mineral Products Manufacturer's Employees Union*. And following the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* Lord Reid in his speech made it clear that the ouster clause will not have the effect of ousting the power 'although the tribunal had jurisdiction to enter on the inquiry if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity'. The decision may be a nullity by reason of a breach or failure to comply with the requirements of natural justice. The writ of certiorari clearly survives because it is fundamental to the courts' constitutional and common law role as the guarantors of due process and the fair administration of law.

[30] It is not disputed that the Industrial Court is a public authority exercising quasi — judicial functions involving industrial disputes between employees and employers under the IRA. Judicial review provides a means by which judicial control of public bodies in exercising their functions is exercised. In Malaysia, supervisory jurisdiction by the High Court over administrative or public bodies is found in O 53 of the RHC (see: Federal Court decision in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; and *Council of Civil Service Unions v Minister for the Civil Service*).

[31] James Foong FCJ in the case of *Ahmad Jefri's* held that O 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief against a public authority (such as the Industrial Court) concerning an infringed right protected under the law; when such an explicit procedure is created, then the general rule all applications for such relief must adhere to the procedure prescribed under O 53 of the RHC, failing which the applications would be liable to be struck off for abuse of the process of the court.

[32] At p 173 of the report (in *Ahmad Jefri* case), the learned judge expressed his view that:

But generally the court should be circumspect in allowing a matter which should be by way of O 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to.

[33] The appellant herein had initiated judicial review under O 53 of the RHC. All the relevant requirements under the said O 53 have been complied

with. Leave had also been granted prior to filing for the judicial review application. The above authorities show that the applicants therein were challenging the order or award of the Industrial Court earlier made against them. The order or award of the Industrial Court is amendable to judicial review. The mode of proceedings under O 53 of the RHC as adopted by the appellant in the present case is correct under the relevant rules. Therefore there is no reason for the learned judicial commissioner to uphold the respondent's preliminary objection and to dismiss the appellant's action with costs.

[34] The learned judicial commissioner had also raised his concern that the Industrial Court had been made a party (as the first respondent) to an action and according to him, this goes against the spirit of s 24(2) of the IRA. We cannot see the reason why the learned judicial commissioner was so unduly concerned on this issue. When the Industrial Court is made a party (as one of the respondents) in an action for judicial review of this nature, it is the award of the Industrial Court is being challenged. It has nothing to do with any member of the court (ie the chairman who presided the Industrial Court). Section 24(2) of the IRA only provides that 'no member of the court shall be compelled by any court to appear as a witness or party in any proceeding before the court in relation to any act, matter or thing performed as a member of the court under the Act'. The concern showed by the learned judicial commissioner on this matter is clearly unfounded and based on his own misconception of the law.

[35] In the case of *Rama Chandran* which had reached the level of the highest court of the country ie the Federal Court, the Industrial Court had been named as the first respondent and the Malaysian Co Operative Consumer Society Ltd (the employer) as the second respondent. The case went through all the three levels of the courts of law ie the High Court, the Court of Appeal and the Federal Court. All the courts accepted the position of the Industrial Court being named as one of the respondents in that case. There is no issue or objection raised by any party throughout the proceedings.

CONCLUSION

[36] Based on the above authorities decided by the Federal Court, we are of the view that the law on this issue is clear and well settled. Any party who is dissatisfied with the decision of the Industrial Court, either on procedural or substantive grounds (on merits) is entitled in law to apply for judicial review to the High Court pursuant to O 53 of the RHC without having first to invoke the mechanism under s 33A of the IRA (as decided by the learned judicial commissioner in the present case). The provisions of the IRA, particularly ss 33A(7)–33B do not proscribe a judicial review remedy under O 53 of the RHC.

[37] This is the current position of the law on the matter. It was decided, adopted, followed and reaffirmed by the highest court of the country, the Federal Court, in a number of cases. It binds all courts below. The doctrine of binding precedent stare decisis is clear and well-settled.

[38] In the present case, the Industrial Court, in a proceedings before it had made a decision in favour of the respondent (employee) that the respondent was dismissed by the appellant (employer) without just cause or excuse. The proceedings were completed and an award was handed down by the Industrial Court. What the appellant wanted is to challenge the decision and the award made by the Industrial Court; not to refer any question of law to the High Court under s 33A of the IRA as suggested by the learned judicial commissioner challenging the whole decision and award by way of judicial review may involve issues of law as well as of facts, evidence and merits. Mechanism under s 33A is confined to reference on question of law only. It does not serve the purpose of the appellant in the present case. The appellant had clearly adopted the correct mode and procedure by applying for a judicial review pursuant to O 53 of the RHC. To ask the appellant to invoke the mechanism under s 33A of the IRA to the facts and circumstances of the present case is totally inappropriate and wrong.

[39] The learned judicial commissioner had clearly erred in upholding the preliminary objection raised by the respondent and dismissing the appellant's judicial review application on that ground. The decision of the learned judicial commissioner cannot stand. We therefore allow the appeal with costs of RM20,000 to the appellant (here and below) and direct that the matter be remitted to the High Court for full hearing of the application before another judge. We also make an order that the deposit be refunded to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor